Kawan Lama Builders Sdn Bhd & Anor v Sykt Lumut Quarry Sdn Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO A-02(IM)(NCVC)-191–01 OF 2019
HAMID SULTAN, HANIPAH FARIKULLAH AND KAMALUDIN MD SAID JJCA
27 JULY 2020

Civil Procedure — Admission — Application for judgment on admission — Rules of Court 2012 O 27 r 3 — Whether admission of fact made in pleadings or otherwise must be clear, unambiguous, unconditional and unequivocal if court was to grant judgment or order on such admission without a trial

The instant appeal dealt with the effect of O 27 r 3 of the Rules of Court 2012 ('the ROC') which allowed a party to a cause or matter to apply for judgment against any other party to the cause or matter based on that party's admission of fact made in his pleadings or otherwise, without waiting for the determination of any other question between the parties. In the instant case, the first appellant ('A1') had appointed the respondent ('R') to supply materials for a building project that A1 had undertaken to do for a third party ('JJM'). Following the termination of the contract between A1 and JJM, the two parties entered into a settlement agreement ('the SA') under which, inter alia, A1 instructed JJM to pay, on its behalf, a sum of RM1.5m directly to R by way of 15 cheques, presumably in settlement of debts that A1 owed R. Subsequently, A1 and JJM entered into another agreement ('the joint agreement') which stated, inter alia, that in view of A1's breach of the SA, both parties would no longer be bound by the terms of the SA and that JJM would no longer be required to make monthly instalment payments to R and that JJM could claim back whatever payments it had made to R under the SA. The joint agreement was made a month after the appellants were sued by R for payment of RM1,002,537.38 being monies owing for goods it had sold and delivered to A1. The second appellant ('A2') had formally guaranteed payment of all debts owing by A1 to R. The appellants added JJM as a third party to the suit and claimed against JJM for an indemnity in the event they were held liable to R. Pursuant to O 27 r 3 of the ROC, R applied for judgment against the appellants on the ground that based on the SA, the joint agreement and the guarantee signed by A2, the appellants had acknowledged (albeit to JJM) the debt they owed to R. The appellants resisted the application saying there was no unequivocal admission of a debt and that R could not rely upon, or enforce, the agreements between the appellants and JJM because R was not privy or party to them. The High Court allowed R's application and entered judgment against the appellants as claimed. The court held that based on the SA there was a clear, unambiguous

A and unequivocal admission by A1 of its debt to R. The instant appeal was against that decision.

Held, unanimously allowing the appeal and setting aside the High Court's decision:

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(1) In view of the serious factual disputes between the parties and the defence of the appellants, it could be concluded that the first appellant had not clearly and unequivocally admitted that it was indebted to the respondent (see para 51).

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(2) In their affidavit, the appellants had raised triable issues to merit a full trial in respect of the SA and the joint agreement. They had shown that there was dispute as to the authenticity and/or contents of the joint agreement (which was disputed in the third-party proceeding pleadings), that there was dispute also as to the contents of the guarantee document and that R had relied on the terms of the SA which had already been terminated (see para 50).

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(3) It was not clear that the appellants had admitted owing the sum claimed by the respondent. Admissions had to be clear if they were to be used against the person making them. Pursuant to cll 3 and 4 of the joint agreement, it was vague and ambiguous whether the appellants were liable to the respondent as alleged in its statement of claim. The court could only act under O 27 r 3 if the admission made was clear, unambiguous, unconditional and unequivocal. Therefore, the respondent would have to prove its claim at trial. The High Court was plainly wrong in finding that cll 5 and 9 of the joint agreement amounted to an unequivocal admission of a debt owing by the appellants to the respondent (see paras 46–48).

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G **[Bahasa Malaysia summary**

Rayuan ini adalah berkenaan kesan A 27 k 3 Kaedah-Kaedah Mahkamah 2012 ('KM') yang membenarkan satu pihak kepada suatu kausa atau perkara untuk memohon penghakiman terhadap mana-mana pihak lain kepada kausa atau perkara tersebut berdasarkan pengakuan fakta pihak tersebut yang dibuat dalam plidingnya atau sebaliknya, tanpa menunggu penentuan apa-apa persoalan lain antara pihak-pihak tersebut. Dalam kes ini, perayu pertama ('A1') telah melantik responden ('R') untuk membekalkan bahan untuk projek bangunan yang mana dilaksanakan oleh A1 untuk pihak ketiga ('JJM'). Berikutan penamatan kontrak antara A1 dan JJM, dua pihak tersebut telah memasuki perjanjian penyelesaian ('PP') di bawah mana, antara lain, A1 mengarahkan JJM membayar bagi pihaknya, sejumlah RM1.5 juta secara langsung kepada R melalui 15 cek, dengan andaian sebagai penyelesaian hutang yang A1 berhutang pada R. Selepas itu, A1 dan JJM telah memasuki satu lagi perjanjian ('perjanjian bersama') yang menyatakan, antara lain,

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bahawa berdasarkan pelanggaran A1 terhadap PP itu, perjanjian bersama dan jaminan yang ditandatangani oleh A2, perayu-perayu telah menjamin bayaran untuk semua hutang yang terhutang oleh A1 kepada R. Perayu-perayu telah menambahkan JJM sebagai pihak ketiga kepada saman itu dan menuntut terhadap JJM untuk ganti rugi sekiranya mereka dipertanggungjawabkan terhadap R. Menurut A 27 k 3 KM, R telah memohon untuk penghakiman terhadap perayu-perayu atas alasan bahawa berdasarkan PP itu, perjanjian bersama dan jaminan yang ditandatangani oleh A2, perayu-perayu telah mengakui (walaupun kepada JJM) hutang yang mereka terhutang kepada R. Perayu-perayu telah menolak permohonan itu dengan mengatakan bahawa tiada pengakuan tegas tentang hutang dan bahawa R tidak boleh bergantung kepada, atau menguatkuasakan perjanjian antara perayu-perayu dan JJM kerana R bukan privy atau pihak kepada mereka. Mahkamah Tinggi telah membenarkan permohonan R dan memasuki penghakiman terhadap perayu-perayu sebagaimana didakwa. Mahkamah memutuskan berdasarkan PP itu terdapat pengakuan yang jelas, tidak taksa dan tegas oleh A1 berhubung hutangnya kepada R. Rayuan ini adalah terhadap keputusan tersebut.

Diputuskan, sebulat suara membenarkan rayuan dan mengetepikan keputusan Mahkamah Tinggi:

(1) Berdasarkan pertikaian faktual yang serius antara pihak-pihak dan pembelaan perayu-perayu, ia boleh disimpulkan bahawa perayu pertama tidak jelas dan tegas mengakui bahawa ia berhutang dengan responden (lihat perenggan 51).

(2) Dalam afidavit mereka, perayu-perayu telah menimbulkan isu-isu yang boleh dipertikaikan untuk mewajarkan perbicaraan penuh berkaitan PP itu dan perjanjian bersama itu. Kedua-duanya menunjukkan terdapat pertikaian mengenai keaslian dan/atau kandungan perjanjian bersama itu (yang dipertikaikan dalam pliding prosiding pihak ketiga), bahawa terdapat pertikaian juga mengenai kandungan dokumen jaminan itu dan bahawa R telah bergantung kepada terma-terma PP itu yang telahpun ditamatkan (lihat perenggan 50).

(3) Ia tidak jelas bahawa perayu-perayu telah mengakui berhutang jumlah yang dituntut oleh responden. Pengakuan perlu jelas jika ia digunakan terhadap seseorang yang membuatnya. Menurut klausa 3 dan 4 perjanjian bersama, ia adalah tidak jelas dan tidak taksa sama ada perayu-perayu bertanggungjawab kepada responden sebagaimana dikatakan dalam penyataan tuntutannya. Mahkamah hanya boleh bertindak di bawah A 27 k 3 jika pengakuan dibuat dengan jelas, tidak taksa, tidak bersyarat dan tegas. Oleh itu responden boleh membuktikan tuntutannya semasa perbicaraan. Mahkamah Tinggi jelas salah dalam penemuannya bahawa klausa 5 dan 9 perjanjian bersama merupakan pengakuan tegas suatu hutang yang terhutang oleh perayu kepada

A responden (lihat perenggan 46–48).]

Cases referred to

Affin Bank Bhd v Successcom Enterprise Sdn Bhd [2009] 1 MLJ 36; [2009] 4 CLJ 764, CA (refd)

B *Bacom Enterprises Sdn Bhd v Jong Chuck & Ors* [2011] 5 MLJ 820, CA (refd)

C-Ampy Construction Sdn Bhd v Andalas Jaya Sdn Bhd [2014] 6 MLJ 599, CA (refd)

Carabao Exports Pty Ltd v Online Management Consultants Sdn Bhd & Ors [1988] 3 MLJ 271, HC (refd)

C *Global Destar (M) Sdn Bhd v Kuala Lumpur Glass Manufactures Sdn Bhd* [2003] MLJU 679; [2004] 5 CLJ 167, HC (refd)

Haron bin Mohammed Zaid v Central Securities (Holdings) Bhd [1982] 3 WLR 134, PC (refd)

D *Hasrat Usaha Sdn Bhd v Pati Sdn Bhd* [2010] MLJU 846; [2010] MLJU 1623; [2011] 2 CLJ 863, CA (refd)

Mersey Steamship Co v Shuttleworth (1883) 11 QBD 531, CA (refd)

Metroplex Holdings Sdn Bhd v Commerce International Merchant Bankers Bhd [2013] 4 MLJ 520; [2013] 8 CLJ 329, CA

E *Perwira Habib Bank (M) Bhd v Hj Abdullah Hj Sulaiman & Anor* [1985] 2 CLJ 489, HC (refd)

RHB Bank Berhad v Wembley Industries Holdings Berhad [2012] 1 LNS 955, HC (refd)

Registered Trade Mark 'Certina', Re (1970) 44 ALJR 191 (refd)

F *Scruttons Ltd v Midland Silicones Ltd* [1962] AC 446, HL (refd)

Vasanthi a/p Rajamanikam v Kalaiselvi a/p Perumal [2013] 4 MLJ 589; [2012] 6 AMR 228, CA (refd)

Vithal Kumar a/l Jayaraman v Azman bin Md Nor [2010] 2 MLJ 67; [2010] 3 CLJ 332, CA (refd)

G *Vong Ban Hin v Laksamana Realty Sdn Bhd* [2003] MLJU 222; [2003] 3 CLJ 129, HC (refd)

Wee Tiang Teng v Ong Chong Hooi & Anor [1978] 2 MLJ 54, FC (refd)

Wong Kian Wah v Ng Kien Boon [2018] MLJU 989; [2018] 1 LNS 1013, CA (refd)

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Legislation referred to

Rules of Court 2012 O 16 r 1(2), O 27 r 3, 3(1), (2)
Rules of the High Court 1980 O 27

I

Appeal from: Civil Suit No AA-22NCVC-4–01 of 2018 (High Court, Ipoh)

Adrian a/l Silvarajoo (Ramli Yusuff & Co) for the appellants.
Nanda a/l Suppiah (AM Ong & Partners) for the respondent.

Hanipah Farikullah JCA:

INTRODUCTION

[1] This is an appeal from the decision of the judicial commissioner ('JC') given on 3 January 2019 by which the learned JC allowed the respondent's (plaintiff) claim against the appellants (defendants).

[2] This appeal requires the court to examine and interpret the provision of O 27 r 3 Rules of Court 2012 ('the ROC 2012') more particularly. The issue to be determined in this appeal is whether an admission made by the appellant to a third party can secure a final judgment for the plaintiff's claim.

[3] The application before the High Court was made pursuant to O 27 r 3 of the ROC 2012. The plaintiff sought the entry of a judgment against the defendant for an outstanding sum of RM1,002,537.38 for the goods sold and delivered by the plaintiff.

[4] We heard the appeal on 6 August 2019 and at the conclusion of the submissions, we unanimously allowed the appeal. Being dissatisfied with our decision, the plaintiff appealed against our decision.

BACKGROUND FACTS

[5] The facts are set out in detail in the judgment of the learned JC. There is no need for us to repeat them except as necessary for the purpose of discussion.

[6] On 29 December 2017, the plaintiff filed a writ of summons and statement of claim against the defendants claiming the arrears in payment amounting to RM1,002,537.38.

[7] The plaintiff was the supplier of goods to the first defendant and the plaintiff is claiming arrears on the basis that the second defendant had signed a declaration and a guarantee letter dated 26 April 2016.

[8] The statement of claims averred that:

(a) the first defendant and the third party had entered into a subcontract agreement whereby the first defendant would do some work in the project known as 'Kerja Kerja Tebatan Banjir dari Kg Terengganu ke TCG T10-J, jalan Woo Saik Hong, Teluk Intan, Perak';

(b) the plaintiff had been appointed by the first defendant to supply the material pursuant to the said project;

A (c) the subcontract agreement between the third party and the first defendant was later terminated;

(d) the third party and the first defendant had entered into 'perjanjian penyelesaian', a settlement agreement referred to us; and

B (e) out of the sum of RM2.5m, it is expressly stated that the first defendant, apart from payments being made directly to certain individuals, had also instructed a sum of RM1.5m be paid directly, on the first defendant's behalf, to the plaintiff. The method of payment was to be by way of 15 cheques, three of which were stated in the plaintiff's statement of claim C as having been paid to the plaintiff toward the plaintiff's claim against the first defendant. From the list of 15 cheques stated, the cheques numbered MBB No 251708, 251709, and 251710, had been used to make part payment to the plaintiff.

D **[9]** Prior to the filing of the statement of defence, the defendants have filed a third party notice pursuant to O 16 r 1(2) of the ROC 2012 against JJM Integrated Sdn Bhd to include JJM Integrated Sdn Bhd as a third party to indemnify the defendants against their liability to the plaintiff in his claim.

E **[10]** The third party had made an application to amend their statement of defence in encl 39 to include a document known as *perjanjian bersama* dated 30 January 2018 ('the document') which was alleged to have been entered by the third party and the first defendant.

F **[11]** On 25 September 2018, the plaintiff had filed a notice of application for a judgment or order on admission of facts under O 27 r 3(1) and (2) of the ROC 2012 based on the third party's documents on the ground that the appellants had acknowledged the debt owed to the plaintiff.

G **[12]** The application in encl 48 was made by the plaintiff after the third party had informed the plaintiff that the third party had filed an affidavit incorporating the agreements between the defendants and the third party.

H **[13]** Enclosure 48 was based on *perjanjian penyelesaian* dated 1 February 2017 and *perjanjian bersama* dated 30 January 2018 which was marked as exh KPC1 and KPC2 respectively in the plaintiff's affidavit in support affirmed by Koh Poh Chai on 21 September 2018.

I 'PERJANJIAN PENYELESAIAN'

[14] In the 'perjanjian penyelesaian' the third party is known as 'pihak pertama' and the first defendant is known as 'pihak kedua'. It would be appropriate at this juncture to refer to the relevant parts of the 'perjanjian

penyelesaian' which states as follows:

Clause 2

Merujuk kepada Klausa 1 di atas *dan sepertimana yang diarahkan oleh Pihak Kedua* dan dipersetujui oleh kedua-dua pihak. *Pihak Pertama dengan ini akan membayar sepertimana yang dinyatakan seperti berikut*:

(a) Pembayaran-pembayaran kepada Kawan Lama Builders Sdn Bhd (No Syarikat 1137936-P) berjumlah Ringgit Malaysia Satu Juta (RM1,000,000.00) tertakluk kepada penama yang dipersetujui Pihak Kedua dan pembayaran ansuran seperti berikut:

(i) ...

(ii) ...

(b) *Pembayaran kepada Syarikat Lumut Quarry Sdn Bhd (No Syarikat 21166-D) berjumlah Ringgit Malaysia Satu Juta Lima Ratus Ribu (RM1,500,000.00)* tertakluk kepada pembayaran ansuran seperti berikut:

(i) Pihak Pertama sebagai ...

(ii) Cek Maybank 15 keping;

(1) MBB No 251707 (RM100,000.00) bertarikh 25 Februari 2017;

(2) *MBB No 251708 (RM100,000.00) bertarikh 25 Mac 2017*;

(3) *MBB No 251709 (RM100,000.00) bertarikh 25 April 2017*;

(4) *MBB No 251710 (RM100,000.00) bertarikh 25 Mei 2017*;

(5) MBB No 251711 (RM100,000.00) bertarikh 25 Jun 2017;

(6) MBB No 251712 (RM100,000.00) bertarikh 25 Julai;

(7) MBB No 251713 (RM100,000.00) bertarikh 25 Ogos;

(8) MBB No 251714 (RM100,000.00) bertarikh 25 September 2017;

(9) MBB No 251715 (RM100,000.00) bertarikh 25 Oktober;

(10) MBB No 251716 (RM100,000.00) bertarikh 25 November 2017;

(11) MBB No 251717 (RM100,000.00) bertarikh 25 Disember 2017;

(12) MBB No 251718 (RM100,000.00) bertarikh 25 Januari 2018;

(13) MBB No 251719 (RM100,000.00) bertarikh 25 Februari 2018;

(14) MBB No 251720 (RM100,000.00) bertarikh 25 Mac 2018; dan

(15) MBB No 251721 (RM100,000.00) bertarikh 25 April 2018. (Emphasis added.)

Clause 5:

5. Pihak Kedua (Kawan Lama Builder Sdn Bhd) dengan ini memberi aku janji akan menyelesaikan *apa-apa pembayaran ganti rugi kepada pemiutang-pemiutang Pihak Kedua dan dengan ini memberi aku janji bahawa Pihak Pertama tidak bertanggungjawab ke atas tuntutan-tuntutan Pihak Kedua.* (Emphasis added.)

A Clause 9

Pihak Kedua dengan ini memberi aku janji bahawa segala tuntutan yang terbit *di antara Pihak Kedua dengan pemiutang-pemiutang* Pihak Kedua sendiri hendaklah diselesaikan oleh Pihak Kedua sendiri tanpa mengikat Pihak Pertama. (Emphasis added.)

B

'PERJANJIAN BERSAMA'

[15] It is not disputed that on 30 January 2018, that the defendant and the third party entered into an agreement referred to as *perjanjian bersama* which, C inter alia, provides as follows:

1. perjanjian penyelesaian bertarikh 1hb Februari 2017 (selepas ini dirujuk sebagai 'perjanjian penyelesaian') telah dimasuki oleh JJM dan Kawan Lama. Sesalinan perjanjian penyelesaian dilampirkan sebagai 'Lampiran D A'.

MAKA ADALAH DENGAN INI DIPERSETUJUI oleh kedua-dua pihak kepada perjanjian ini seperti berikut:

(i) Kawan Lama telah memberi aku janji di dalam perjanjian penyelesaian E bahawa tidak akan mengakibatkan kacau ganggu yang tidak terhad sama ada secara fizikal, kata-kata, dana apa-apa tindakan sepertimana yang ditakrifkan di bawah undang-undang ke atas JJM dan tidak terhad ke atas wakil, ejen dan pekerja JJM sama ada di Pejabat JJM dan juga tapak projek sepertimana Perjanjian Sub- Kontrak bertarikh 1.12.2015;

F (ii) Kawan Lama juga telah memberi aku janji di dalam perjanjian penyelesaian bahawa penama-penama di bawah dengan ini tidak akan menuntut apa-apa lagi daripada JJM dan juga tidak akan membuat kacau ganggu yang tidak terhad sama ada secara fizikal, kata-kata, dana apa-apa tindakan sepertimana yang ditakrifkan di bawah undang-undang ke atas JJM sepanjang tempoh Perjanjian ini (perjanjian penyelesaian) dan juga G sepanjang tempoh Projek tersebut dijalankan serta sehingga habis terma perjanjian ini selesai. Penama-penama tersebut adalah seperti berikut:

(a) Ling Ing Hook (No K/P 731121–08–5199);

(b) Teng Chee Lay (No K/P 760721–02–5307);

H (c) Ding Ring Diong (No K/P 550917–08–6309);

(d) Ti Swee Yeng (No K/P 710629–08–5184).

(iii) Kawan Lama telah memungkiri terma-terma dalam perjanjian penyelesaian dan kedua-dua pihak telah bersetuju bahawa mereka tidak I perlu lagi mematuhi terma-terma yang telah dipersetujui di dalam perjanjian penyelesaian;

(iv) Maka, JJM tidak perlu patuhi segala terma-terma yang dijanjikan di dalam perjanjian penyelesaian dan JJM tidak perlu membayar ansuran-ansuran kepada Syarikat Lumut Quarry Sdn Bhd JJM juga

berhak untuk menuntut balik segala bayaran yang telah dibuat oleh JJM kepada Syarikat Lumut Quarry Sdn Bhd berdasarkan kepada terma–terma dalam perjanjian penyelesaian;

(v) Kawan Lama tidak boleh mengambil sebarang tindakan untuk ansuran-ansuran bulanan berjumlah RM1,000,000 yang belum dibayar oleh JJM kepada Syarikat Lumut Quarry Sdn Bhd dan JJM juga tidak boleh mengambil tindakan terhadap Kawan Lama untuk wang yang telah dibayar oleh JJM kepada Syarikat Lumur Quarry Sdn Bhd dan Subramaniam A/L Murugan (No K/P 780622–08–5281) bagi pihak Kawan Lama;

(vi) Ti Swee Yeng (No K/P 710629–08–5184) ialah seorang pengarah Kawan Lama telah diberi kuasa untuk menandatangani perjanjian bersama ini;

(vii) Terma masa di mana disebut di dalam perjanjian ini adalah penting dan menjadi intipati kepada perjanjian ini;

(viii) Perjanjian ini (bersama-sama dengan apa-apa dokumen yang disebut di dalam perjanjian ini) membentuk persefahaman di antara kedua-dua pihak kepada perjanjian ini;

(ix) Apa-apa notis, permintaan atau tuntutan yang dikehendaki disampaikan di bawah perjanjian ini oleh mana-mana pihak kepada pihak yang satu lagi hendaklah secara bertulis dan hendaklah disifatkan sebagai penyampaian yang mencukupi:

(a) Sekiranya dihantar oleh pihak itu atau peguamcaranya melalui pos berdaftar ke alamat pihak yang satu lagi itu seperti yang dinyatakan di dalam perjanjian ini dan di dalam hal sedemikian ianya hendaklah disifatkan sebagai telah diterima pada tamatnya tempoh tiga (3) hari dari surat berdaftar yang sedemikian diposkan; atau

(b) Sekiranya ia diberikan oleh pihak itu atau peguamcaranya dengan tangan kepada pihak satu lagi itu atau peguamcaranya.

(x) Apa jua pertukaran alamat oleh mana-mana pihak hendaklah diberitahu secara bertulis kepada pihak yang satu lagi; dan

(xi) Semua lampiran kepada perjanjian ini hendaklah dikira, dibaca dan ditafsirkan sebagai kepada pihak yang satu lagi.

THE APPEAL

[16] The plaintiff asserted that the first defendant had acknowledged the debt owed to the plaintiff based on the following documents:

(a) *perjanjian penyelesaian* dated 1 February 2017 between JJM Integrated Sdn Bhd and the first appellant;

(b) *perjanjian bersama* dated 30 January 2018 between JJM Intergrated Sdn Bhd and the first defendant; and

(c) guarantee letter and declaration dated 26 April 2016 which was signed by the second appellant.

[17] On the contrary, the defendants contended that:

(a) that there was no unequivocal admission as required under O 27 r 3 of the ROC 2012; and

(b) that the defendants were not privy to the documents and the contents of the documents are highly disputed in the affidavits.

ISSUE

[18] The question to be considered is whether the provisions of O 27 r 3 permit the court to grant final judgment for the plaintiff's claim based on the admission by the first defendant to a third party.

[19] The application before the High Court was not concerned with the admission in a pleading.

ORDER 27 R 3 OF THE ROC 2012

[20] The application by the plaintiff as we have stated earlier was made under O 27 r 3 of the ROC 2012 which is in the following terms:

> 3(1) Where admission of fact made by a party to a cause or matter either by his pleadings or otherwise, any other party to the cause or matter may apply to the Court for such judgment or order as upon those admission he may be entitled to, without waiting for the determination of any other question between the parties, and the Court may give such judgment, or make such order, on the application as it thinks just.
>
> (2) An application for a judgment or order under this rule shall be made by a notice of application.

[21] Order 27 r 3 of the ROC 2012 permits a party to the suit to apply for final judgment on part of the relief sought in the statement of claim.

[22] The purpose, of course, of extracting an admission of fact is to enable a party to obtain speedy judgment where the other party has made a plain admission entitling the former to succeed in his claim and undisputed facts that provide an evidentiary basis for the court to conclude that there are no triable issues for trial.

[23] It is important to note that O 27 r 3 of the ROC 2012 is concerned with admissions of fact, and it does not matter any such admission was made in a

pleading, or otherwise. This court in the case of *Vithal Kumar a/l Jayaraman v Azman bin Md Nor* [2010] 2 MLJ 67; [2010] 3 CLJ 332 states that the words 'or otherwise':

> The words 'or otherwise' in the said rule are of general application and justify the making of an order or judgment where an admission is made by letter or other relevant documents or agreements which clearly show that the defendant has no defence to the plaintiff's claim. They are not confined to admission contained in the pleadings alone.

[24] In our view, a court can pass a judgment under O 27 r 3 on the basis that the statement made by the parties on any documents. The only condition is that there must be clear, unequivocal and unambiguous.

[25] In *Re Registered Trade Mark 'Certina'* (1970) 44 ALJR 191 Barwick Co, speaking on the Rules of the High Court which is expressed in equivalent terms to our O 27 r 3, said at p 192:

> The powers which the Rules give to a Justice in Chambers must be exercised with great caution ... but in a clear case a proper exercise of the poser will obviate the delay involved in a hearing and will save unnecessary expense.

[26] It is, therefore, necessary that the fact or facts admitted be identified with clarity. The admission must be clear and not simply evidence of fact upon which the plaintiff would have to rely to establish his cause of action (see *Vishal Kumar*).

[27] As was correctly stated by the learned JC in his judgment, this rule entitles a party in receipt of clear and explicit admission of fact from an opponent, to apply to court for 'speedy judgment' upon the said admission by way of a summary procedure, without having to wait for the determination of any other outstanding issues between the parties (see *Vasanthi a/p Rajamanikam v Kalaiselvi a/p Perumal* [2013] 4 MLJ 589; [2012] 6 AMR 228; *Global Destar (M) Sdn Bhd v Kuala Lumpur Glass Manufactures Sdn Bhd* [2003] MLJU 679; [2004] 5 CLJ 167; *Vong Ban Hin v Laksamana Realty Sdn Bhd* [2003] MLJU 222; [2003] 3 CLJ 129; *Carabao Exports Pty Ltd v Online Management Consultants Sdn Bhd & Ors* [1988] 3 MLJ 271; *Vithal Kumar a/l Jayaraman v Azman bin Md Nor* [2010] 2 MLJ 67; [2010] 3 CLJ 332).

[28] As to what is an admission upon which the court will be prepared to act on an application under O 27 r 3, the most useful case is the decision of the High Court in *Perwira Habib Bank (M) Bhd v Hj Abdullah Hj Sulaiman & Anor* [1985] 2 CLJ 489. The case concerns a question whether what was stated was an admission of fact and if so whether that admission entitled the applying

party to a judgment or order. The facts of the case are as follows. The defendants were sued as guarantors of a customer of the plaintiff bank. Judgement in default was entered against the second named defendant. The first defendant entered an appearance and filed a statement of defence. Thereafter, the first defendant's solicitors wrote a letter to the plaintiff's solicitors which was not marked 'without prejudice', proposing that the first defendant be allowed to pay the judgment sum by monthly installments of RM10,000. The plaintiffs then sought to obtain summary judgment on the basis that pursuant to O 27 of the Rules of the High Court 1980 ('the RHC 1980') the letter amounted to an admission of the plaintiffs' claim. This application was dismissed with costs by the senior assistant registrar.

[29] VC George J (as he then was) held as follows:

> 1. Whether the letter was written before or after the statement defence was filed is not the point. The question is whether what is stated is an admission of fact and if so whether that admission entitles the applying party to a judgment or order.
>
> 2. The admission must amount to an unequivocal admission before the judgment by the summary procedure provided by O 27 r 3 can be granted.
>
> 3. The admission may be implied from all the circumstances.
>
> 4. In the instant case, 'I will pay' does not necessarily imply 'as I am legally obliged to do', hence there was no unequivocal admission for it to pronounce judgment by the summary procedure provided by O 27 r 3 of the RHC 1980'.

[30] *Perwira Habib Bank* has been followed by a number of cases (see *Vong Ban Hin v Laksamana Realty Sdn Bhd* [2003] MLJU 222; [2003] 3 CLJ 129; *RHB Bank Berhad v Wembley Industries Holdings Berhad* [2012] 1 LNS 955; *Hasrat Usaha Sdn Bhd v Pati Sdn Bhd* [2010] MLJU 846; [2010] MLJU 1623; [2011] 2 CLJ 863; *Metroplex Holdings Sdn Bhd v Commerce International Merchant Bankers Bhd* [2013] 4 MLJ 520; [2013] 8 CLJ 329; *Affin Bank Bhd v Successcom Enterprise Sdn Bhd* [2009] 1 MLJ 36; [2009] 4 CLJ 764).

[31] More importantly, a court under the provision of this rule will not allow a final judgment to be entered unless the admissions are clear and unequivocal nor will the judgement be allowed to be entered where there is a serious question of law or fact to be argued (see *Affin Bank Bhd v Successcom Enterprise Sdn Bhd*; *Perwira Habib Bank*; *Vithal Kumar*; *Mersey Steamship Co v Shuttleworth* (1883) 11 QBD 531; *Haron bin Mohammed Zaid v Central Securities (Holdings) Bhd* [1982] 3 WLR 134; *Hasrat Usaha Sdn Bhd v Pati Sdn Bhd* [2010] MLJU 846; [2010] MLJU 1623; [2011] 2 CLJ 863).

AT THE HIGH COURT

[32] The learned JC noted that the so-called admission had been made by the defendants in cl 5 of the 'perjanjian penyelesaian'. The following is what the learned JC said:

> h) Clause 5 of the 'Persetujuan Penyelesaian' expressly stated that the first defendant would be responsible for its creditors and that the third party will not be responsible for claims from the first defendant's creditors. Read in the context of Clause 5 the plaintiff was regarded as a creditor along with others where the first defendant had instructed direct payments to be made to. The 'Persetujuan Penyelesaian' was signed by the second defendant as well as another director of the first defendant.

[33] The learned JC held that the admission of facts made by the defendants was clear and unambiguous. The relevant part of the judgment is at para 18 when he found that the 'perjanjian penyelesaian' amounts to an unequivocal admission by the first defendant's debt to the plaintiff.

[34] Relying on the case of *Perwira Habib Bank (M) Bhd*, the learned JC held that the 'perjanjian penyelesaian' amounts to an unequivocal admission by the first defendant's debt due to the plaintiff.

[35] The learned JC also refers to the case of *Wong Kian Wah v Ng Kien Boon* [2018] MLJU 989; [2018] 1 LNS 1013 where this court held as follows:

> Admission can come before the writ is filed or during the case management or even during the trial. The pleading rules play little significance when parties to an action actually admits the sum claim and such admission may even be contrary to the pleaded case.

ANALYSIS

[36] In essence, learned counsel for the defendants argued that the learned judge court fell into error in relying on cl 5 and cl 9 of the *perjanjian penyelesaian*. It was contended for the defendants that the *perjanjian penyelesaian* was entered between the first defendant and the third party in which the plaintiff was not privy to it. The plaintiff is estopped from relying on these documents as the doctrine of privity clearly provides that a non-party to a contract may not enforce the provisions of the contract even though some of the provisions may appear to benefit the respondent.

[37] In support to the submission for the defendant, learned counsel relied on the following grounds:

> 16.1.2 Both clause 5 and clause 9 merely states that the First Party (JJM Intergrated Sdn Bhd) shall not be liable for any claims made against the Second Party (Kawan

Lama Builders Sdn Bhd), the defendants in this case. Nothing stated in the clauses had a clear and unequivocal admission of the debt owed to the Respondent by the Appellants in this case.

16.1.3 The Perjanjian Penyelesaian did not state payment should be made to the Appellants for the goods sold and delivered.

16.1.4 It was stated in clause 2(b) of the Perjanjian Penyelesaian that the Third Party is to make payments of RM1,500,000.00 as a means of settlement with the Respondent on the debts owed by the Appellants to the Respondent. The Plaintiff also failed to explain why the Respondents took the money paid by the third party where they claimed it was the Appellants who owed them the money.

16.1.5 This Perjanjian Penyelesaian was entered between the Appellants and the Third Party in which the Respondent was not privy to it. The Respondent is estopped from relying on this document as the doctrine of privity clearly provides that a non- party to a contract may not enforce the provisions of the contract even though some of the provisions may appear to benefit the Respondent.

[38] The defendant sought to rely on the English case of *Scruttons Ltd v Midland Silicones Ltd* [1962] AC 446 which dealt with the position of the doctrine of privity. The court in *Scruttons* held:

In considering the various arguments by the appellants, I think it is necessary to have in mind certain established principle of the English law of contract. Although I may regret it, I find it impossible to deny the existence of the general rule that a stranger to a contract cannot in a question with either of the contracting parties take advantage of provisions of the contract, even where it is clear from the contract that some provision in it was intended to benefit him. That rule appears to have been crystallised a century ago in *Tweddle v Atkinson* (1861) 1 B & S 393 and finally established in this House in *Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd* [1915] AC 847.

[39] For the submission, the defendant also relied on *Bacom Enterprises Sdn Bhd v Jong Chuck & Ors* [2011] 5 MLJ 820 in which this court held as follows:

[101] ... The plaintiff is definitely not a party to the sale agreement and hence cannot enforce or rely on for protection on its provisions even if same provisions therein was intended to benefit him.

[114] ... This would of course be in line with the doctrine of privity. The doctrine is clear. A non-party bring an action on the contract. A person not a party to a contract cannot enforce or rely for protection on its provision. The rule of privity relates to who can enforce the contract. The doctrine of privity is clearly illustrated in *Pollock & Mulla on Indian Contracts and Specific Reliefs Act* (12th Ed) Vol 1 at pp 25–26; it reads:

Two aspect of the doctrine

The doctrine has two aspects. The first aspect is no one but parties to the contract is entitled under it. Contracting parties may confer rights or benefits upon the third

party in the form of promise to pay, or to perform a service or a promise not to sue (at all or in circumstances covered by an exclusion or limitation clause). But the third party on whom such right or benefit is conferred by contract can neither sue under it nor can rely on defences based on the contract.

The second aspect to the doctrine is that parties to a contract cannot impose liabilities on a third party. A person cannot be subjected to the burden of a contract to which he is not a party. It is the counterpart of the proposition that a third party cannot acquire rights under a contract. This rule, for example, also bars a person from being bound by an exemption clause contained in a contract to which it is not a party, so that a contract between A and B cannot impose liability on C.

[40] In response, the plaintiff submitted that the contents of *perjanjian penyelesaian* is valid and binding on the defendants. In our view, the principle of privity of contract is not relevant to the application of O 27 r 3. Under this rule, the court can, at an interlocutory stage of the proceedings, enter a judgment on the basis of admission contained in any document including from a third party made by the plaintiff or the defendant. But before the court can act on the admission, it has to be shown that the admission is unequivocal, clear and unambiguous

[41] The question of whether or not the alleged admission is clear and unambiguous is an important consideration. Admissions must be clear if they are to be used against the person making them.

[42] The plaintiff contended that pursuant to cl 4 of the *perjanjian penyelesaian* all instalment payments stated in the *perjanjian penyelesaian* were to be made by way of cheques and their respective cheque numbers as stated in the *perjanjian penyelesaian*. In this connection, the plaintiff had received three cheques, cheques numbered MBB251708, MBB251707 and MBB251710 from the third party as payment that was due and owed by the defendants.

[43] It is not a disputed fact that subsequent to the *perjanjian penyelesaian*, the defendant and the third party have entered into a *perjanjian bersama*. Pursuant to the recital and cl 11, the *perjanjian penyelesaian* is to be read with *perjanjian bersama*.

[44] Therefore, the court has to consider what the defendant had agreed to with the third party in cll 3 and 4 of the *perjanjian bersama*.

[45] Clauses 3 and 4 of the *perjanjian bersama* reads as follows:

3. Kawan Lama telah memungkiri terma-terma dalam Perjanjian Penyelesaian dan kedua-dua pihak telah bersetuju bahawa mereka tidak perlu lagi mematuhi terma-terma yang telah dipersetujui di dalam Perjanjian Penyelesaian.

A 4. Maka, JJM tidak perlu patuhi segala terma-terma yang dijanjikan di dalam Perjanjian Penyelesaian dan JJM tidak perlu membayar ansuran-ansuran kepada Syarikat Lumut Quarry Sdn Bhd. JJM juga berhak untuk menuntut balik segala bayaran yang telah dibuat oleh JJM kepada Syarikat Lumut Quarry Sdn Bhd berdasarkan kepada terma-terma dalam Perjanjian Penyelesaian.

B

[46] We have carefully read all of the provisions of *perjanjian penyelesaian* relied by the plaintiff and in our view, it is not clear that the defendant admitted owing RM1,002,537.38 for the goods sold and delivered by the plaintiff as contended in its statement of claim and encl (48). Admissions must be clear if C they are to be used against the person making them.

[47] Furthermore, pursuant to cll 3 and 4 of the *perjanjian bersama*, whether the defendant is liable to the plaintiff as alleged in its statement of claim is vague and ambiguous. The court can only act under O 27 r 3 if the admission made D by the defendant is clear, unambiguous, unconditional and unequivocal. Therefore, the plaintiff would have to prove its claim in a trial.

[48] In our view, the learned Judge was plainly wrong in his findings that cll 5 E and 9 of the *perjanjian bersama* amount to an unequivocal admission of a debt owing by the defendants to the plaintiff.

[49] If we may add, in *Wee Tiang Teng v Ong Chong Hooi & Anor* [1978] 2 MLJ 54, the Federal Court held that for there to be a sufficient F acknowledgement, the language of the debtor must be equivocal (see also *C-Ampy Construction Sdn Bhd v Andalas Jaya Sdn Bhd* [2014] 6 MLJ 599).

[50] Therefore, we accept the defendants' submissions that the defendants had in the affidavit raised the following triable issues for a full trial in respect of G the *perjanjian bersama* and *perjanjian penyelesaian*:

(a) there exist triable issues pertaining to the authenticity and/or its contents of the *perjanjian bersama* dated 30 January 2018 and it has been disputed in the pleadings of third party proceedings;

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(b) the respondent relied on the *perjanjian penyelesaian* dated 1 February 2017 which has been terminated on 4 April 2018. The effect of its enforcement should be determined during full trial; and

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(c) the personal guarantee and declaration dated 26 April 2016 are trial documents which have been disputed as to the contents of the documents which should only be determined during full trial.

CONCLUSION

[51] In view of the serious factual disputes between the parties and the defence of the defendants, it can be concluded that the first defendant had not clearly and unequivocally admitted that they were indebted to the plaintiff.

[52] It follows that the learned JC has erred in his application of the relevant rules to the facts of this case. Therefore, we allowed the appeal with no order as to costs. The decision of the learned JC is hereby set aside.

Appeal allowed and High Court's decision set aside.

Reported by Ashok Kumar